

# Preuptial Agreements

## Some recent developments

By James Ressel

**Groucho Marx once quipped that “The husband who wants a happy marriage should learn to keep his mouth shut and his cheque book open”.**

**And so it is with pre-nuptial agreements, in order to try to keep the proverbial chequebook unopened, spouses set out to prescribe what should happen in the event that their relationship breaks down.**

**This fact sheet takes a brief look at the current status of prenuptial agreements in English family law, illustrated by some recent court decisions.**

### **Division of assets on divorce:**

Unlike other European jurisdictions, English matrimonial law does not allow the parties to a marriage to exclude pre-marital assets from becoming marital assets on marriage. In the event of a marital breakdown the English courts have an unfettered discretion to divide and distribute all the marital assets according to the principles laid down in Section 25 of the Matrimonial Causes Act 1973 (“MCA”).

The factors considered by the court in reaching an equal, just and fair decision, include the following:

- The parties respective income, property and earning capacity;
- The parties respective financial needs, obligations and responsibilities;
- Age of the parties and duration of the marriage;
- Standard of living enjoyed by the family;
- Respective parties contributions to the welfare of the family;
- The conduct of any party that, in the opinion of the court, it would be inequitable to disregard.

### **Prenuptial agreements:**

Although agreements between spouses may still be generally considered as void for public policy reasons, it is now accepted that prenuptial agreements can validly exist as contractual agreements and as such the normal rules on entering into contracts apply.

However even though prenuptial agreements may be valid and lawful contracts they cannot be generally enforced in ancillary relief proceedings.

Recent developments in case law suggest that even though prenuptial agreements are not enforceable their very existence amounts to one important factor the court takes into account when dealing with the division of family assets on divorce.

That is to say, the very existence of the agreement is likely to help the court in reaching a fair outcome. The prenuptial agreement may also give the judge some contemporaneous evidence of the state of the parties’ financial standing before entering into the marriage and their intentions as to any proposed financial provision in the event of the breakdown of the marriage. This may usefully assist the court in determining the parties’ respective contribution to the welfare of the family.

However for a prenuptial agreement to achieve even this level of persuasiveness and become an ‘important factor’ in ancillary relief, it is prudent to make sure that you obtain legal advice and follow the four steps to a ‘good’ prenuptial agreement.

### **The Four Steps to a ‘good’ prenuptial agreement are:**

1. Both parties need to take independent legal advice.
2. Both parties must provide disclosure to the other of their assets.
3. Neither party must be subject to undue pressure being exerted to sign the document.
4. The prenuptial agreement must provide for a fair settlement, meeting the needs of both parties and their children in the event of the breakdown of the marriage.

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#### The Cases

Below you will find some cases illustrating the court's current likely approach to prenuptial agreements. You may find that some facts in the cases chime with your unique circumstances.

#### What the Courts say about Prenuptial Agreements:

##### **G v G (Financial Provisions: Separation Agreement) [2000]**

**Facts:** H was 54 and W was 35 when they met. Both had been married before and had children from previous relationships. The day before a wedding they signed a prenuptial agreement drawn up by H's solicitor incorrectly stating that they had both received independent legal advice. On the second anniversary of their marriage by way of gift W provided H with another agreement renouncing all claims against H, save for an equivalent home and reasonable monthly salary to maintain her and her property. Two years later the parties separated and entered into a separation agreement giving the W a house and maintenance for life. H applied to the court to vary the terms of the separation agreement.

**Court:** In this case the various agreements entered into by the parties before, during and after their marriage were significant factors to be considered by the court. The court upheld the provision in W's favour carried through the various agreements. The judge said that "the aspect of the case which should be afforded the greatest weight is the bargain that the parties themselves struck just before their separation"

##### **M v M (Prenuptial Agreement) [2002]**

**Facts:** H and W entered into a prenuptial agreement in Canada shortly before marriage. W was pregnant and anxious to marry. H had been married before and distressed from previous divorce would not marry without a prenuptial agreement. The agreement stated that H would pay W £275,000 if the relationship ended. They separated after five years and W sought a settlement of £1.3m. H was then net worth was £7.5m and W's was £300,000.

**Court:** Awarded W £875,000 plus child maintenance and school fees. Here W received a lesser settlement because of the existence of the prenuptial agreement, even though the terms of the agreement were not upheld. The agreement was considered by the court to be an important factor but even then it did not override need and fairness. The judge said "it would be as unjust to the H to ignore the existence of the agreement and its terms as it would be to the W to hold her strictly to those terms"

#### **Both Parties should get Independent Legal Advice**

##### **X v Y (Y and Z Intervening) [2002]**

**Facts:** Here H and W reached an agreement on divorce and ancillary relief whereby H agreed not to petition for W's adultery, so she could petition on grounds of unreasonable behaviour, and in return he would receive £500,000. The court refused to approve the consent order. H issued an application to show cause why the minutes of agreement should not be made an order.

**Court:** Held that the agreement should be made an order of the court on the basis that both parties had entered into the agreement with the benefit of legal advice.

#### **The Agreement should provide for Children, Maintenance and Capital**

##### **K v K (Ancillary Relief: Prenuptial Agreement) [2003]**

**Facts:** This was a 14-month marriage, with one child. W was pregnant before marriage and put pressure on H to marry. W had assets of £1m; H's assets were in the region of £25m. W's father insisted on a prenuptial agreement, with the benefit of independent legal advice for both parties. Under the terms of the agreement W was to receive £100,000 per year. W wanted £1.6m plus maintenance. H offered £120,000 plus £600,000 in trust to provide a house for W and child until the child finished full time education.

**Court:** Upheld the H's offer of £120,000 given the terms of the prenuptial agreement but ordered that he provide £1.2m trust for a house and on order for maintenance because the agreement was silent as to maintenance. The agreement here was upheld in so far as it provided for the W's capital claims. In absence of an agreement it is likely that W would have received a far larger capital share.

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#### Both Parties should provide

##### Disclosure:

#### **J v V (Disclosure: Offshore Corporations) [2004]**

**Facts:** H and W married for ten years and had three children. W signed a pre-nuptial agreement purporting to prevent her from claiming against H's assets. The agreement was signed the night before a wedding and without legal advice. H was worth £15m

**Court:** Awarded W £3.3m. The court accepted that agreements could be of relevance but both parties need to receive independent legal advice and neither must be under pressure to sign the document. The judge said, "This contract was signed on the very eve of the marriage, without proper disclosure and it made no allowance for the arrival of children".

#### **V v C [2004]**

**Facts:** Parties signed a prenuptial agreement in Spain. It provided for separate property and H and W to contribute to the needs of the child with special needs in proportion to their earnings. The marriage lasted five years. H was worth £4.8 m. W had only debts and no income.

**Court:** awarded W £800,000 for a house, repayment of her debts, £750,000 to provide an income and joint lives maintenance with the child. Here the court took the prenuptial agreement into account and it is arguable that in absence of an agreement W would have achieved a higher settlement.

#### Neither party should be subject to Undue Pressure to Sign an Agreement: **A v A [2007]**

**Facts:** Parties married in 1998 and had two children. In 2004 H became aware that W was having an affair with his best friend. H insisted that W sign a post-nuptial agreement as a condition of reconciliation, which she was pressured into signing. On divorce W applied for financial provision.

**Court:** In this case the post-nuptial agreement was not binding as W had been put under pressure to sign it. The court accepted that the prenuptial agreement is a relevant factor but it must be freely entered into and not be signed under pressure. It also requires full disclosure and independent legal advice. The court accepted that such agreements are much more likely to be accepted in the future but always "subject to the discretion of the court and the application of a test of fairness/manifest unfairness"

#### Jurisdiction can be Agreed in an Agreement:

##### **Ella v Ella [2007]**

**Facts:** H and W both dual British Israeli nationals, married in Israel in 1996. Four days before the wedding they signed a prenuptial agreement whereby only Israeli law would apply to any questions regarding property disputes. H and W moved to London, had three children and divorced in London. On the basis of the prenuptial agreement H applied for the proceedings in England to be stayed on the basis that the matter should be heard in Israel.

**Court:** In granting H's application for a stay of proceedings the court dismissed the W's appeal on the basis that the judge was right to regard the prenuptial agreement as a major factor when making her decision.

#### Concluding remarks

In summary, providing you follow the Four Steps to a 'good' pre-nuptial agreement set out above and ensure that any such agreement is fair to both of you, there is a good prospect that should you face a financial claim in future divorce proceedings the court may very well have high regard to the agreement you have entered with your spouse.

A well-prepared agreement could well save you uncertainty, stress and anxiety. It could well save you the substantial costs of heavily contested financial proceedings.

Finally, in the unfortunate event of a divorce a well-crafted agreement could promote harmony and ensure that your spouse and children are fairly provided.

Should you be interested in discussing the possibility of preparing such an agreement with us further, please contact James Ressel by e-mail and ask for our pre-nuptial agreement questionnaire.

#### For further information, please contact:

**James Ressel** jr@lzwlaw.co.uk